WHAT JUDGMENT SHOULD BE ENTERED BY THE APPELLATE COURT WHEN IT OVERRULES A DEMURRER TO A PLEA?

In his excellent pamphlet on "Demurrer," Prof. Martin P. Burks raises a nice question of appellate practice. On page 29, we find the following:

"Suppose, however, the plaintiff demurs to a plea, and the demurrer is sustained, and the defendant stands upon his plea and does not ask to put in a new plea, and in this condition the case is taken to an appellate court, which decides that the plea is good, what is the result? What judgment should the appellate court enter upon the pleadings? It has been held that final judgment should be entered up for the defendant; that the appellate court cannot remand with liberty to withdraw the demurrer and reply. *Wilson* v. *Mt. Pleasant Bank,* 6 Leigh 570, 575."

Prof. Burks cites the case of *Taylor* v. *Sutherlin-Meade Co.,* 107 Va. 787, as being in conflict with the *Pennsylvania Railroad Co. et als.* v. *Smith,* 106 Va. 645, and as leaving it doubtful in Virginia as to whether our Supreme Court will follow the rule of *Wilson* v. *Mt. Pleasant Bank, supra,* or the more liberal policy of remanding the case with liberty to the plaintiff to withdraw his demurrer and reply. It is the purpose of this note to give the authorities in Virginia which appear to bear on this question, and, if possible, to establish that the more liberal policy should be adopted.

It is well settled that where the appellate court reverses the lower court on account of failure to sustain a demurrer to a declaration for misjoinder of counts, the appellate court will send the case back, with leave to the plaintiff to amend, if he be so advised.[1]

1. This specific question was decided in Creel *v.* Brown, 1 Rob. 265. In that case there was a misjoinder of counts,—one being in assumpsit, the other in tort. There was a demurrer to the declaration; but the record did not disclose that the same had ever been passed upon. Judgment below was for the plaintiff. The Supreme Court reversed the judgment, remarking that the demurrer ought to have been sustained, and sent the case back for judgment on the demurrer, unless the plaintiff should, on leave obtained in the lower court, amend his declaration. Standard, J., in delivering the opinion of the court, said: "But as it appears to this court, that by reason of the misjoinder of

Likewise it is well settled that when the appellate court reverses the lower court for failure to sustain a demurrer to a plea, the appellate court will allow the defendant to file a new plea.[2]

So, also, when the lower court was reversed for failure to sustain the demurrer to the plaintiff's replication, the appellate court directed the lower court "to render judgment thereon for the defendant, unless the plaintiff withdraws his said replication, which

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action (one of the counts in the declaration being in case as for a tort, and the other in assumpsit), the demurrer ought to have been sustained; and as the plaintiff might (had the right judgment on the demurrer in the court below preceded the trial of the issue) have cured the defect in the declaration by amendment, and from that benefit the irregularity of first trying the issue in fact would have precluded him, the objection founded on this irregularity becomes substantial, and ought to prevail, so far as to entitle him to have the cause placed in the court below in the position it would have occupied had the irregularity not occurred." The court therefore remanded the cause instructing the lower court "to proceed to judgment on the demurrer, unless the plaintiff should, on leave obtained in that court, amend his declaration; and if the declaration be amended, for such further proceedings on the present pleadings, and such other pleadings as may be offered by either party and admitted by the court."

In Fitzhugh's Ex'or *v.* Fitzhugh, 11 Gratt. 300, 306, there was a demurrer to the declaration for misjoinder of counts, which was overruled in the lower court. The Supreme Court held that, as the judgment on the first two counts would have to be in form de bonis propriis, while on the third count it would have to be de bonis testatoris, the first two counts could not be joined with the third, and therefore ruled that the demurrer should have been sustained. The judgment of the Supreme Court (page 380) was that the judgment of the court below should be reversed, and the cause remanded, in order that the defendant in error might amend his declaration, if so advised; and on his failure to make a motion to that effect, that the (lower) court might render judgment for the plaintiff in error,—citing Hale *v.* Crow, 9 Gratt. 263; Strange *v.* Floyd, 9 Gratt. 474.

Stricti juris, at common law, where a demurrer to a declaration has been sustained, the suit should be dismissed; but the practice in Virginia has been otherwise from the time of Tabb *v.* Gregory, 4 Call 225. See also Duval and wife *v.* Chelf & Co., 92 Va. 489, 1 Va. Law Reg. 895, and note of Judge Burks, at page 900; Pennsylvania Railroad Co. *v.* Smith, 106 Va. 645.

2. Hamtramck *v.* Selden, Withers & Co., 12 Gratt. 28; Reid *v.* Field, 83 Va. 26.

he should have liberty to do, if he asks it, and file a sufficient replication in its stead."[3]

At common law, amendments to pleadings could be readily obtained at any time before issue was joined; but after the record was made up, and the pleadings entered on the roll, there was reluctance to admit of any alteration, through fear of defacing the record; therefore *stricti juris,* at common law where a demurrer to a declaration was sustained, the suit was dismissed.[4]

Since the time of *Tabb* v. *Gregory,*[4] the rigor of the common law as to amendments of pleadings has been relaxed; and our statute allowing the defendant to plead as many several matters, whether of law or fact, as he shall think necessary, seems in line with the same policy.[5]

If then, the Supreme Court, after sustaining demurrers to declarations, has allowed the plaintiff to amend; and, after sustaining demurrers to pleas, has allowed defendants to file new pleas; and, after sustaining demurrers to replications, has allowed the plaintiff to file new replications, it would seem that, after overruling a demurrer to a plea, the court would, pursuing the same liberal policy, allow the plaintiff to withdraw his demurrer and reply.

While it is the general rule that a demurrer admits as true all averments of material facts which are sufficiently pleaded, this admission under the present state of the law, is only for the purpose of determining the legal sufficiency of the pleading in which such facts are alleged.[6]

In other words, the party demurring formerly took this position: "I admit that the material facts which have been sufficiently pleaded by you are true, but you do not state a good cause of action (or ground of defense, as the case may be)." As the law now is, the position of the demurrant may be stated thus: "*Even if* what you allege is true (but I do not admit that it is), still you do not state a good cause of action (or ground of de-

3. Cromer *v.* Cromer's Administrators, 29 Gratt. 280, 286.

4. Tabb *v.* Gregory, 4 Call 225, 228.

5. Sec. 3264, Va. Code, 1904.

6. 6 Ency. Pl. & Pr. 338; Crogan *v.* Schiele, 53 Conn. 208.

fense, as the case may be)." It is evident, therefore, that when the demurrer to a pleading is overruled, the demurrant has admitted nothing. Is there any more reason, then, why the demurrant should be precluded from pleading further than there is for precluding the demurree, when the Supreme Court sustains the demurrer? Should not the former enjoy every privilege granted to the latter?

In discussing the question of the effect of overruling a demurrer, 6 Ency. Pl. & Pr. at page 361, et seq., says:

"The order overruling the demurrer does not, as a general thing, direct a final but an interlocutory judgment against the demurrant. The demurrant may then, upon leave obtained, plead over or answer. Leave, however, is usually necessary, and a plea filed without obtaining leave of court after a demurrer has been overruled may be stricken out. The demurrant is not entitled as of course to plead over or answer, but it rests in the sound discretion of the court to grant or refuse such leave."

It will be noted that no distinction is made by the above authority between the effect of overruling a demurrer to the declaration and the effect of overruling a demurrer to any other pleading; and the same authorities in treating of the effect of sustaining a demurrer to declaration or other pleadings state the rule to be, that at common law when a general demurrer was sustained the judgment thereon was final.[7]

In Virginia when a trial court sustains a demurrer to a plea, it has long been the practice for the court to enter judgment for the plaintiff, unless the defendant should ask leave to withdraw his plea and substitute another in its stead; and it has likewise been the practice, upon overruling the demurrer to a plea, to permit the plaintiff to withdraw his demurrer and object to the reception of the plea or to reply to it.[8]

Under a liberal construction of the statute requiring the appellate court to enter such judgment, decree or order as the court below ought to have entered,[9] it would seem that it was the legis-

7. 6 Ency. Pl. & Pr. 352, et seq.

8. Burks on Demurrer, page 29.

9. Sec. 3485.

lative intent for the appellate court to exercise the same powers over the pleadings and procedure as the trial court had.

Prof. Burks cites the case of *Taylor et al.* v. *Sutherlin-Meade Tobacco Co. et al.*,[10] as throwing doubt on the position for which we contend. In that case, which was an attachment in equity, the Supreme Court sustained the motion to quash the attachment because the affidavit upon which it was issued did not show that it was made by "the plaintiff, his agent or attorney" as required by our present statute;[11] and the Supreme Court refused to amend its order so as to allow the appellants to prove in the lower court the agency by the secretary and treasurer of the company, as there was an absence of application of the appellees to amend the affidavit in the trial court. The ground upon which the court based its refusal was that there was no statutory authority for amending the affidavit. There is a great difference between amending an affidavit for an attachment and amending the pleadings. An attachment is either void or valid, and if the affidavit upon which it is filed is not sufficient, the attachment necessarily is void; and to allow an amendment to the affidavit would be to make valid that which up to the time of the amendment had been invalid; or in other words, the effect would be to make the lien date back to the time when there was no lien. Therefore, it seems that the point decided in that case cannot be held to be identical with the question here discussed.

In *Wilson and others* v. *Bank of Mt. Pleasant*,[12] an action in debt was brought by the bank on a judgment against Wilson and others rendered in the state of Ohio, by confession, under a power of attorney made before action was brought. The defendants pleaded that the power of attorney under which the judgment was confessed was given by some person to the defendants unknown, and was not given or made by them, or any or either of them, and that they had no notice of the suit in Ohio in which the judgment was so confessed. This plea was not verified by affidavit, but it was received without being objected to for that cause; and

10. 107 Va. 787.

11. Sec. 2959, 2964, Va. Code 1904.

12. 6 Leigh 570.

the bank demurred to it generally. There was a statute which required that a plea of *non est factum* should not be received unless verified by oath or affirmation.[13] It was held by a majority of the court that if a plea of *non est factum* be offered which is not verified by affidavit, the proper method of taking advantage of the defect is to object to the reception of the plea, and that it is impossible to take advantage thereof by demurrer; for by demurrer the facts stated in the plea are admitted, and, therefore, the affidavit will be considered as waived. In consequence it was further held that, as the demurrer admitted the facts, the Supreme Court, upon reversing the judgment of the lower court, could not grant leave to the plaintiffs to withdraw their demurrer and take issue, and therefore the court reversed the judgment of the court below and entered judgment for the plaintiffs in error. Judge Brockenbrough, however, was of opinion that there was no express waiver of the affidavit by the plaintiffs, and that therefore the cause ought to have been sent back, authorizing the plaintiffs, either to withdraw their demurrer, and move for the rejection of the plea, or to waive the affidavit and take issue on it. At the time of the rendering of this judgment the statute on the subject of rendering judgment by the appellate court provided that the court might "give such decree or judgment * * * as the court whose error is sought to be corrected ought to have given."[14]

The statute now provides that the appellate court shall "enter such judgment, decree *or order* as the court whose error is sought to be corrected ought to have entered."[15] Under the broader statute that we have at present, it would seem that the power of the appellate court has been extended, thereby giving it the right to enter an order to the court below, allowing the demurrant to withdraw his demurrer and proceed in the manner suggested by Judge Brockenbrough.

13. Revised Code of 1819, ch. 128, § 33, p. 496; § 3278, Va. Code 1904.

14. Revised Code 1819, ch. 64, § 21, p. 195.

15. Sec. 3485.

On account of the unsettled state of the law on this question, the careful practitioner will rarely, if ever, demur to a plea in Virginia, but he will move to reject the plea when offered, or to strike it out after it has been received; for by this method the point can be saved and brought to the attention of the appellate court by a bill of exceptions.[16]

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16. C. & O. Ry. Co. *v.* Rison, Trustee, 99 Va. 18, 28.